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TESTIMONY IN SUPPORT OF SB 733 (S-2)

PROPOSED SB 733

Factual Summary of Representative Case

The necessity for this statutory amendment struck me when I recently defended an action filed by a local resident against the City of Rochester Hills. The resident claimed that on January 19, 2012, he encountered a crack in the street in front of his house while walking his dog. The subdivision in which he lives does not have sidewalks. He alleged that he "stepped in a crevice . . . , causing his leg to buckle". He fell and sustained injuries to his left knee, quadr tendon, hips, and back.

The City of Rochester Hills had no actual notice of this crevice before Plaintiff's fall. No resident, including Plaintiff had ever complained about the condition of the roadway at this location, and no City employees had encountered it when doing routine road maintenance. The City did have some general knowledge that Plaintiff's subdivision included some roads that were more heavily-traveled, older and more worn than others in the City. It conducted periodic pavement surveys whereby it rated the quality and condition of its roads, so that it could prioritize the order in which roadways were replaced. Plaintiff's subdivision road was not at the top of the list.

In defending the City of Rochester Hills, we argued that because of Michigan's freeze/thaw cycles, roads expand and contract; crevices or potholes can emerge virtually

overnight. This is particularly true where a street has been cold-patched previously. The crevice into which Plaintiff claimed his foot slid, was at a joint seam in the concrete. Once the existing snow was brushed away, there was evidence of gravel in the crack and it appeared to have been previously patched.

We took the position that it was not possible for anyone to pinpoint accurately when this crack in the road (into which Plaintiff claimed his toe/foot became lodged) became wide enough and deep enough to constitute a trip hazard. Because of the ice and snow covered the crevice, no one could truly say how long it existed in that condition – whether it existed for the 30 days or longer prior to the incident, required under the current statute to presume that the City had notice of it. (The climatological data obtained showed that during the 30 days before the accident, there were repeated snow fall events and ice accumulation.) Plaintiff, we maintained, could not show that a reasonably observant person would have recognized that the crevice was a cause for concern. Therefore, the City should not have been deemed, under the statute, to have known of the existence of this crack and recognized that the road was (arguably) not in "reasonable repair". Municipalities, we argued, should be entitled to common sense protection from lawsuits by residents who trip while walking in the road - at least equal to that afforded to them when similar claims are brought by people who trip on sidewalks.

Existing Law

At the time of the incident, the highway exception to governmental immunity, MCL 691.1402, provided:

Except as otherwise provided in Section 2a, each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for

travel may recover the damages suffered by him or her from the governmental agency . . .

In *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143; 615 NW2d 702 (2000), the Supreme Court held that pedestrians can recover for injuries sustained while walking on the roadway designed for vehicular travel. The Court, nonetheless, signaled its recognition that it was imposing on municipalities a more onerous burden than they would have if they were merely required to maintain and repair roads, in a condition safe for vehicular travel.

MCL 691.1403 provided:

No governmental agency is liable for injuries or damages caused by defective highways unless the governmental agency knew, or in the exercise of reasonable diligence, should have known of the existence of the defect and had a reasonable time to repair the defect before the injury took place. Knowledge of the defect and time to repair shall be conclusively presumed when the defect existed so as to be readily apparent to an ordinarily observant person for a period of 30 days or longer before the injury took place.

At the time, pedestrians claiming that they were injured while walking on sidewalks (expressly designed for pedestrian travel), were subject to MCL 691.1402a. This provision addresses only sidewalk liability, and read:

- (2) A discontinuity defect of less than two inches creates a rebuttable inference that the municipal corporation maintained a sidewalk, trailway, crosswalk or other installation outside the improved portion of the highway designed for vehicular travel in reasonable repair.¹

¹ That sidewalk statute has been amended to govern claims arising on or after *March 13, 2012*, and now states:

- (3) In a civil action, a municipal corporation that has a duty to maintain a sidewalk under subsection (1) is presumed to have maintained the sidewalk in reasonable repair. This presumption may only be rebutted by evidence of fact showing a proximate cause of the injury was one or both of the following:
 - (a) A vertical discontinuity defect of two inches or more in the sidewalk.
 - (b) A dangerous condition in the sidewalk itself of a particular character other than solely a vertical discontinuity.

Currently, when a trip and fall occurs on a sidewalk, local municipalities are provided some degree of protection from, not only liability, but the cost of litigating less substantial claims. It is inherently incongruent not to provide the same legislative protection to municipalities when lawsuits are brought by pedestrians who trip and fall because of pavement imperfections *in the street*. It is even more irreconcilable when one considers the practical difficulties of maintaining roadways in Michigan (designed for vehicular travel) safe for pedestrians. Roads are subject to more intensive use by heavier vehicles and, at least in Michigan, are subjected to repeated plowing, salting, and greater wear and tear. Anyone familiar with Michigan's pothole problems can easily understand and sympathize with the hardship imposed by essentially requiring that roadways be maintained to a higher standard of pedestrian safety than sidewalks, which are designed for pedestrian traffic and undergo far less stress.

Proposed SB 733 (S-2)

The proposed legislation places on more equal footing, claimants who trip and fall as a result of alleged road imperfections, and those claiming that sidewalk defects caused them to become injured. SB 733 (S-2) uses the language of the current sidewalk liability statute (MCL 691.1402a) and applies it to pedestrians bringing claims under the highway exception (MCL 691.1402).